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<b>S.G., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 20-1308</b>
	)	<b>Issued: September 9, 2021</b>
<b>U.S. POSTAL SERVICE, NORTHERN NEW</b>	)	
<b>JERSEY PERFORMANCE CLUSTER,</b>	)	
<b>Kearney, NJ, Employer</b>	)	
	)	

*James D. Muirhead, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

On June 22, 2020 appellant, through counsel, filed a timely appeal from a March 17, 2020 merit decision and a May 29, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

<sup>3</sup> The Board notes that, following the March 17, 2020 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the caserecord that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of disability on or after March 4, 2017 causally related to her accepted employment conditions; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 23, 2011 appellant, then a 38-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained a lumbar sprain due to her work duties, which included prolonged standing, engaging in lifting, pushing, and bending. She indicated that she first became aware of her claimed condition on June 13, 2011. Appellant stopped work on June 14, 2011 and returned to limited-duty work on July 23, 2011. OWCP accepted that she sustained thoracic or lumbosacral radiculitis/neuritis and lumbar radiculopathy, and it paid wage-loss compensation on the supplemental rolls for disability from work.

The findings of a July 20, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine contained an impression of disc herniation at L5-S1 with annular tear and bilateral posterior bulging of the annulus fibrosus at L4-5. In a January 10, 2012 report, Dr. Allen Glushakow, an attending Board-certified orthopedic surgeon, reported physical examination findings and diagnosed lumbosacral radiculitis, herniated L5-S1 disc, and significant bulging at L4-5.

OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for an examination and second opinion regarding whether she continued to have residuals of her accepted employment conditions. In a February 17, 2012 report, Dr. Lakin reported findings on physical examination, noting that appellant had minimal tenderness in her lower paralumbar musculature bilaterally with no spasms. Appellant had 5/5 strength in her legs and a normal neurological examination with minimal tenderness in the lumbar spine. Dr. Lakin opined that appellant's employment-related conditions had resolved, that she had no concurrent nonwork-related disability, and that she could perform her regular-duty work.

In a May 15, 2012 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Lakin's February 17, 2012 report. It afforded appellant 30 days to submit evidence or argument challenging the proposed action. In response, appellant submitted April 17, May 24, and June 8, 2012 reports from Dr. Glushakow. In his June 8, 2012 report, Dr. Glushakow diagnosed lumbosacral radiculitis, herniated L5-S1 disc, and probable disc protrusion at L4-5, and noted, "In my opinion, [appellant's] diagnoses are causally related to the accident of June 13, 2011 and represent an aggravation of a previous condition as well."

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<sup>4</sup> Docket No. 13-2049 (issued February 12, 2014).

By decision dated July 5, 2012, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 5, 2012, based on Dr. Lakin's February 17, 2012 report. Appellant subsequently submitted November 13 and December 12, 2012 reports in which Dr. Glushakow opined that her herniated lumbar disc and lumbar radiculopathy conditions were greatly accelerated by the performance of her repetitive work duties. He indicated that she continued to have disability due to the effects of this work-related aggravation.

By decision dated March 7, 2013, OWCP's hearing representative affirmed the July 5, 2012 termination decision. Appellant appealed to the Board and, by decision dated February 12, 2014,<sup>5</sup> the Board affirmed the March 7, 2013 termination decision.

In early-2017 appellant was working in a full-time limited-duty position at the employing establishment. She stopped work on March 4, 2017.

In a March 21, 2017 report, Dr. Sayed Bakhaty, a Board-certified anesthesiologist, indicated that appellant presented on that date and reported worsening symptoms of lower back pain, which radiated into both lower extremities down to the feet (right more than left). He noted that, upon physical examination, appellant's lumbar spine flexion was restricted by 45 degrees and her extension was restricted by 15 degrees. Appellant exhibited tenderness/spasm along the paraspinal muscles at L3 through S1 and the neurological examination revealed diminished sensation to light touch/pinprick bilaterally. Dr. Bakhaty noted that appellant had a weakness grade of 4/5 associated with the right L5 nerve, and that her left ankle dorsiflexion and knee extension also had a weakness grade of 4/5. He diagnosed status post work-related injury in June 2011 with exacerbation of previous back injuries, which was stabilized prior to the injury, status post lumbar discography with positive concordant pain emanating from L5-S1 and L4-5 with evidence of annular tear at both levels and right foraminal stenosis/herniation, post-traumatic lumbar radiculopathy (persistent and recurrent), post-traumatic lumbar facet joint pain syndrome, and post-traumatic myofascial pain syndrome. Dr. Bakhaty opined that all these diagnoses were causally and directly related to the work-related injury in June 2011, which exacerbated a previous work-related injury at the lower back, thereby causing a worsening of symptoms. He noted that, in the prior few weeks, she had experienced a recent exacerbation, warranting increased treatment, and he maintained that appellant sustained permanent injuries, which continued to interfere with her daily living activities, working activities, and sleep pattern. Dr. Bakhaty recommended that appellant undergo selective disc decompression at L4-S and L5-1 with right foraminal decompression, including facetectomy, laminotomy, herniectomy, and annuloplasty at both levels.

In a March 31, 2017 report, Dr. Francis A. Pflum, a Board-certified orthopedic surgeon, indicated that appellant was seen on that date and complained of low back pain that radiated into her right lower extremity. Appellant reported that she stopped work on February 4, 2017 due to increased weakness in her right lower extremity. Dr. Pflum noted that, upon physical examination, appellant exhibited diffuse tenderness and a marked decrease in range of motion of the lumbosacral spine, as well as decreased sensation in the entire right lower extremity. He reported that appellant had a mild decrease in strength in the extensor hallucis longus on the right side and unequivocal weakness of plantar flexion at both ankles (more on the right than the left). Dr. Pflum noted that appellant was markedly disabled and was a candidate for surgery. He indicated, however, that he

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<sup>5</sup> *Id.*

was waiting for a new MRI scan to be obtained and advised that appellant would be reevaluated after it was obtained.

On April 7, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of total disability on March 4, 2017 causally related to her accepted employment conditions. She asserted that she had been working in a limited-duty position on a full-time basis and was operating a flat sorting machine at the beginning of March 2017 when, over the course of a week, she started having back pain that radiated into her right leg. Appellant believed that her current condition was related to her original employment injury because she was experiencing the same symptoms, including an inability to put pressure on her right leg due to pain. On the reverse side of the form a supervisor indicated that appellant's limited-duty job restricted her from lifting more than 10 pounds or engaging in climbing or kneeling.

In support of her recurrence claim, appellant submitted a March 8, 2017 note from Dr. Glushakow who placed her off work beginning March 4, 2017 due to incapacitation from an L5 radiculopathy. Dr. Glushakow indicated that on March 13, 2017 appellant would be able to perform light-duty work, which did not require lifting more than 10 pounds. In a March 21, 2017 note, Dr. Bakhaty noted that appellant was seen with severe lower back pain and had been advised to stay off work for two weeks pending reevaluation. In a March 22, 2017 note, Dr. Glushakow advised that appellant was totally incapacitated from work for two weeks beginning March 13, 2017. In an April 11, 2017 note, Dr. Bakhaty indicated that appellant underwent a lumbar epidural injection on April 6, 2017 and was scheduled for another on April 12, 2017. He indicated that appellant had been advised to stay off work in order to treat the worsening symptoms of "her previous work-related injury."

An April 21, 2017 MRI scan of appellant's lumbar spine revealed an impression of posterior disc herniation at L5-S1, ventral herniation at L4-5 with an associated annular tear, and umbilical hernia containing omental adipose tissue.

In an April 25, 2017 report, Dr. Bakhaty diagnosed status post work-related accident in June 2011 with multiple injuries most marked at the lower back, which persisted despite the prolonged course of conservative measures, status post lumbar sensory transforaminal epidural injection with moderate improvement of pain and then recurrence of symptoms interfering with daily living activities, working activities, and sleep pattern. post-traumatic lumbar disc herniation more significant at L5-S1 and L4-5 with evidence of herniation, annular tear, foraminal stenosis, and persistent post-traumatic lumbar radiculopathy; and post-traumatic myofascial pain syndrome. He asserted that all these diagnoses were causally and directly related to the June 2011 accident.

In a May 18, 2017 report, Dr. Pflum discussed the April 21, 2017 MRI scan report and opined that appellant's low back/lower extremity pain and right lumbar radiculopathy (secondary to herniated discs) were related to the June 13, 2011 employment injury. He indicated that most of appellant's problems stemmed from the L5-S1 discs and some stemmed from the L4-5 discs. Dr. Pflum requested authorization for low back surgery, including a discectomy from the right side at L4-5 (far lateral approach at L5) with foraminotomy and annuloplasty, as well as discectomy at

L5-S1 (posterior approach) with a laminotomy, disc excision, and a post-discectomy treatment. He advised that appellant had an intubation problem during a previous attempt at surgery.<sup>6</sup>

In a development letter dated September 14, 2017, OWCP requested that appellant submit additional factual evidence in support of her recurrence of disability claim, including a physician's opinion supported by a medical explanation regarding the relationship between the claimed disability and the accepted employment conditions. It provided a questionnaire for her completion, which posed questions regarding why she believed she sustained an employment-related recurrence of disability. OWCP afforded her 30 days to respond.

In response, appellant submitted a September 13, 2017 report of Dr. Bakhaty, which was similar to his April 25, 2017 report. Dr. Bakhaty again opined that appellant's multiple diagnoses were causally related to the June 2011 employment injury. He advised that appellant's pain symptoms grossly affected her daily living activities, working activities, sleep pattern, and overall quality of life.

In a September 14, 2017 report, Dr. Pflum indicated that he had recommended that appellant undergo low back surgery.

In a September 28, 2017 report, Dr. Pflum advised that when he evaluated appellant on March 31, 2017 she had stopped working due to an exacerbation of pain symptoms related to her June 13, 2011 employment injury, which had never gone away. He indicated that after late-February 2017 the symptoms became so severe that she had to stop working on March 4, 2017. Dr. Pflum maintained that the reason appellant stopped working had to do with her previous injury and noted that there was no intervening injury or new exposure to the factors causing the original illness. With respect to the March 4, 2017 work stoppage, he further noted, "[T]he reason that she stopped working was because of the fact that she had an exacerbation of her symptoms and she had increased pain and increased weakness of her right upper extremity which precluded her from working. At that time, it appeared that she was markedly disabled.... She is unable to continue to work." Dr. Pflum indicated that, due to appellant's disability, he had requested authorization for surgical intervention.

By decision dated October 16, 2017, OWCP denied appellant's recurrence of disability claim, finding that she had not submitted sufficient medical evidence to establish a recurrence of disability commencing March 4, 2017 causally related to her accepted employment conditions.

On February 22, 2018 appellant, through counsel, requested reconsideration of the October 16, 2017 decision.

In an undated response to OWCP's development questionnaire, appellant indicated that in early March 2017 she experienced a worsening of the same type of back and right lower extremity pain she had experienced since her original employment injury. She asserted that she had been totally disabled from work since stopping work on March 4, 2017.

Appellant submitted October 19 and November 30, 2017 reports in which Dr. Pflum noted that she continued to exhibit examination findings of sensory loss and decreased strength in her

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<sup>6</sup> In July 27 and August 24, 2017 reports, Dr. Pflum again noted that he had recommended that appellant undergo low back surgery.

right lower extremity. In a January 16, 2018 report, Dr. Bakhaty diagnosed status post work-related injury in June 2011, with multiple injuries most marked at the lower back, status post lumbar transforaminal epidural injection with moderate improvement of leg symptoms and persistent recurrent axial lower back pain, post-traumatic bilateral lumbar facet joint pain syndrome, post-traumatic lumbar radiculopathy, improving following injections, with recurrent disc herniation awaiting surgery, and post-traumatic myofascial pain syndrome. He opined that these conditions were causally related to the June 2011 accident.<sup>7</sup>

In a January 18, 2018 report, Dr. Pflum discussed appellant's medical history, including the findings of the examination he conducted on April 7, 2016. He opined that appellant was disabled due to L4-5 and L5-S1 disc pathologies and lumbar radiculopathies, which were causally related to her June 13, 2011 employment injury. In April 5 and 19, August 16, and December 20, 2018 reports, Dr. Pflum indicated that appellant continued to be disabled and in need of surgical intervention.<sup>8</sup> In his December 20, 2018 report, he again requested authorization for low back surgery, including discectomy from a posterior approach with laminotomy at L5-S1, and discectomy from the right side from a far lateral transforaminal/transpedicular approach with foraminotomy and discectomy on the right side at L4-5.

By decision dated January 30, 2019, OWCP denied modification of its October 16, 2017 decision.

On January 10, 2020 appellant, through counsel, requested reconsideration of the January 30, 2019 decision.

Appellant submitted April 4, August 28, and November 6, 2019, and February 12, 2020 reports from Dr. Pflum who indicated that she was totally disabled from work and in need of surgical intervention.

In a February 19, 2020 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon, serving as an OWCP district medical adviser, indicated that he had reviewed Dr. Pflum's most recent report and agreed with his opinion that appellant's current medical condition was causally related to the original employment injury. He noted that appellant did not have back and leg pain prior to the original work injury. Dr. Ugokwe opined that the proposed discectomy from a posterior approach with laminotomy at L5-S1 was necessitated by the accepted employment conditions.

By decision dated March 17, 2020, OWCP denied modification of the January 30, 2019 decision.

By separate decision dated March 17, 2020, OWCP authorized lumbar surgery, including discectomy from a posterior approach with laminotomy at L5-S1, and discectomy from the right

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<sup>7</sup> Dr. Bakhaty produced a similar report on May 22, 2018.

<sup>8</sup> In an April 19, 2018 duty status report (Form CA-17), Dr. Pflum listed the date of injury as June 13, 2011, provided a diagnosis "due to injury" of herniated lumbar discs, and found that appellant was totally disabled from work.

side from a far lateral transforaminal/transpedicular approach with foraminotomy and discectomy on the right side at L4-5.

On May 26, 2020 appellant, through counsel, requested reconsideration of the March 17, 2020 decision. Counsel noted that OWCP had approved lumbar surgery on March 17, 2020, but advised that appellant had not yet undergone the surgery due to the COVID-19 pandemic. He asserted that Dr. Pflum's reports and other medical evidence showed that appellant was "very disabled" and required lumbar surgery.

Appellant submitted copies of reports dated August 24, September 14 and 28, October 19, and November 30, 2017 by Dr. Pflum and a July 20, 2011 MRI scan of the lumbar spine, which had previously been submitted to OWCP.

By decision dated May 29, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.<sup>10</sup> This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.<sup>11</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>12</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment

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<sup>9</sup> It is noted that there is no indication in the case record that, by the time OWCP issued the May 29, 2020 decision, appellant had undergone the lumbar surgery authorized by OWCP on March 17, 2020.

<sup>10</sup> 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

injury, and supports that conclusion with medical reasoning.<sup>13</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>14</sup>

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work.<sup>15</sup> As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.

### **ANALYSIS -- ISSUE 1**

The Board finds that this case is not in posture for decision.

Appellant submitted a September 28, 2017 report from Dr. Pflum who advised that when he evaluated appellant on March 31, 2017 she had stopped working due to an exacerbation of pain symptoms related to her June 13, 2011 employment injury, which had never gone away.<sup>16</sup> He indicated that after late-February 2017 the symptoms became so severe that she had to stop working on March 4, 2017. Dr. Pflum maintained that the reason appellant stopped working had to do with her previous injury and noted that there was no intervening injury or new exposure to the factors causing the original illness. With respect to the March 4, 2017 work stoppage, he further noted, “[T]he reason that she stopped working was because of the fact that she had an exacerbation of her symptoms and she had increased pain and increased weakness of her right upper extremity which precluded her from working. At that time, it appeared that she was markedly disabled.... She is unable to continue to work.” Dr. Pflum indicated that, due to appellant’s disability, he had requested authorization for surgical intervention.

In a January 18, 2018 report, Dr. Pflum discussed appellant’s medical history, including the findings of the examination he conducted on April 7, 2016. He opined that appellant was disabled due to lumbar radiculopathies, as well as L4-5 and L5-S1 disc pathologies, which were casually related to her June 13, 2011 employment injury. Appellant also submitted a March 8, 2017 report from Dr. Glushakow who placed her off work beginning March 4, 2017 due to incapacitation from her lumbar radiculopathy. In an April 11, 2017 report, Dr. Bakhaty indicated that appellant should stay off work in order to treat the worsening symptoms of her employment-related injury. Further, the DMA indicated that he had agreed with Dr. Pflum’s opinion that appellant’s current medical condition was causally related to the original employment injury. He

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<sup>13</sup> *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

<sup>14</sup> *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

<sup>15</sup> *See D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>16</sup> OWCP accepted that appellant sustained thoracic or lumbosacral radiculitis/neuritis and lumbar radiculopathy. Appellant had indicated that she sustained these conditions by performing her work duties over a period of time and that she first became aware of them on June 13, 2011.



opined that the proposed discectomy from a posterior approach with laminotomy at L5-S1 was necessitated by the accepted employment conditions.

The Board notes that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.<sup>17</sup> The Board finds that while the reports of appellant's attending physicians, Drs. Pflum, Glushakow, and Bakhaty, are insufficient to meet appellant's burden of proof, they raise an uncontroverted inference of causal relation between her claimed recurrence of disability and her accepted federal employment conditions. Further development of appellant's claim is therefore required.<sup>18</sup>

On remand OWCP shall prepare a statement of accepted facts and refer appellant to an appropriate Board-certified specialist for a second opinion examination and an evaluation regarding whether she sustained a recurrence of disability on or after March 4, 2017 causally related to her accepted employment conditions. If the physician opines that appellant did not have employment-related disability on or after March 4, 2017, he or she must explain with rationale how or why the opinion differs from those of Drs. Pflum, Glushakow, and Bakhaty.<sup>19</sup> Following any necessary further development, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>17</sup> See *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

<sup>18</sup> See *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>19</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 17 and May 29, 2020 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 9, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board